APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-15038

D.C. CV-89-0682-CAL

DONALD F. BOGUE,
Plaintiff/Appellant,

v.

AMPEX CORPORATION and ALLIED-SIGNAL, INC.;
DOES 1-10, INCLUSIVE,
Defendants/Appellees.

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted
March 12, 1992—San Francisco, California

Filed October 7, 1992
Amended December 2, 1992

Before: John Minor Wisdom,* Robert R. Beezer, and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Wisdom

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* The Honorable John Minor Wisdom, United States Circuit Judge for the Fifth Circuit, sitting by designation.

ORDER AND AMENDED OPINION

WISDOM, Circuit Judge:

The plaintiff/appellant, Donald Bogue, seeks severance payments denied him by his former employer. The district court upheld that denial under the Employee Retirement Income Security Act ("ERISA").[1] We find that ERISA controls this case, supports the denial of benefits, and offers Bogue no other opportunity to challenge the decisions below. We AFFIRM, but decline to award attorney fees to the appellees.

I. *BACKGROUND*

Donald Bogue was a Vice President of the Audio-Video Systems Division of Ampex Corporation, a Redwood City manufacturer of sound equipment. Allied-Signal owned Ampex between September 1976 and May 1987. During November 1986 Allied-Signal informed ten executives of Ampex (including Bogue) that it intended to sell Ampex. To retain those executives, at least temporarily, Allied-Signal established the "Allied-Signal/E & I Sector Special Compensation Program for Designated Key Executives".[2] The program provided for severance benefits if

> neither Allied-Signal nor the Buyer [of Ampex] offers you "substantially equivalent" employment and your employment is terminated.

"[S]ubstantially equivalent employment" was defined as a job that included "responsibilities similar" to those while Allied-Signal still owned Ampex. Allied-Signal

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[1] 29 U.S.C. § 1001, *et seq.*

[2] Mindful of ERISA's language, Allied-Signal carefully refers to this program as the "Plan". Bogue is similarly careful to call it the "Program". We prefer "program" because that is the word used in November 1986 letters by Allied-Signal in describing to key executives its "Special Compensation Program for Designated Key Executives",

would determine whether the benefits were appropriate in each case. The program would end on March 31, 1988.[3]

Allied-Signal sold Ampex in May 1987. Ampex (through its new owner) assumed liability for paying severance benefits under the program. The new president of Ampex reorganized the business and offered Bogue a position as Vice President of Marketing, Sales & Service. He accepted the offer in the hope that it would help his career; he told Ampex, however, that he considered the position one that was not "substantially equivalent" to his old job. Citing the same complaint and seeking severance pay under the program, he resigned from Ampex in January 1988. Allied-Signal, which had obligated itself to administer the program after the sale of Ampex, denied Bogue's request for severance pay. It based that decision on Ampex's argument that Bogue's new position *was* substantially equivalent to his previous job.

Bogue later filed a lawsuit against Ampex and Allied-Signal in state court. The defendants successfully removed the case to federal court based on ERISA preemption; the district court denied Bogue's request for remand to state court, and later granted summary judgment in favor of Allied-Signal and Ampex. The district court concluded that Allied-Signal's denial did not abuse its fiduciary discretion, that no conflict of interest existed between Allied-Signal and Ampex that would require the court to apply a more stringent standard of review, and that Bogue had not made out a violation of 29 U.S.C. § 1140, which prevents an employer from intentional discrimination in depriving its employees of plan benefits.[4] Bogue appeals these decisions. The defendants "intend to seek attorney fees for the appeal"; we read that intent as a request for those fees.

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[3] The program also provided for a "Stay Bonus" and a "Sale Price Incentive", neither of which are at issue here.

[4] The court made other conclusions irrelevant to this appeal.

II. *DISCUSSION*

A. ERISA Preemption

ERISA preemption [5] provides for the removal to federal court of lawsuits involving employee benefit plans. Because ERISA preemption is the sole basis of federal jurisdiction in this case we must decide whether the "Special Compensation Program for Designated Key Executives" is an "employee benefit plan" under ERISA.

ERISA preemption is notoriously broad, but several recent cases have held that it has reasonable limits. In the leading case on this question the Supreme Court held that ERISA did not preempt a state plant-closure law that provided for a lump sum severance payment, triggered by a single event that may never occur.[6] In *Fort Halifax* the Court found that such a law "simply creates no need for an ongoing administrative program for processing claims and paying benefits".[7] Bogue contends that the Allied-Signal severance payment program should be similarly exempt from ERISA preemption. It had a very short term (17 months); it applied only contingently, *if* Ampex were sold, *and* if the employee were denied substantially equivalent work by the buyer; and it would apply only once to any individual employee. Allied-Signal contends that the program, by its own terms, required the sort of discretionary decision-making by the plan's administrator that is the hallmark of an ERISA plan. We agree with Allied-Signal. The program before us involved more than what *Fort Halifax* describes as "[t]he theoretical possibility of a one-time obligation in the future".[8]

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[5] ERISA provides that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan". 29 U.S.C. § 1144(a).

[6] *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).

[7] *Id.* at 12.

[8] *Id.*

Bogue finds support in the Fifth Circuit's post-*Fort Halifax* opinion in *Wells v. General Motors Corp.*[9] *Wells* held that the General Motors "procedure by which employees could elect to receive a one-time lump payment if they ceased working at the plant" [10] was not an ERISA plan. The Court found that

> [t]he plan was not ongoing, nor was there any need for continuing administration of the payment program . . . . The facts that GM made the payments pursuant to a Voluntary Termination of Employment "*Plan*" and that the employees received a benefit do not convert the plan into an "employee benefit plan" for purposes of ERISA.[11]

This language might suggest that the Allied-Signal program, because of its limited time frame, its contingency, and its one-time application to any affected employee, was not an ERISA plan. Considering Allied-Signal's concession that even it was unaware that the program might be subject to ERISA, Bogue's argument is not without merit. In finding that the program is susceptible to ERISA preemption, however, we choose to follow the approach of the Third Circuit in considering a severance plan similar to the program in this case, and a more recent Fifth Circuit case that narrows the broader implications of *Wells*.

In *Pane v. RCA Corp.*,[12] the Third Circuit held that a corporation severance agreement, instituted to keep key employees at work during the possibly lengthy consummation of a corporate merger, was an ERISA plan. The court stated simply, without further elaboration, that

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[9] 881 F.2d 166 (5th Cir.), *reh'g en banc denied*, 887 F.2d 1083 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990).

[10] *Id.* at 176.

[11] *Id.*

[12] 868 F.2d 631 (3d Cir. 1989).

the severance agreement "required an administrative scheme".[13]

The reasoning of a recent Fifth Circuit case, *Fontenot v. NL Indus., Inc.*,[14] fleshes out the logic behind *Pane* accurately describing the fence between cases involving real ERISA plans and cases such as *Fort Halifax*. *Fontenot* looks to whether the plan in question " 'require[s] an administrative scheme' because 'the circumstances of each employee's termination [have to be] analyzed in light of [certain] criteria' ".[15] We adopt this approach, which places the Allied-Signal program on the ERISA side of that fence.

In this case, Allied-Signal, the program's administrator, remained obligated to decide whether a complaining employee's job was "substantially equivalent" to his pre-acquisition job. Although the program, like the plans in *Fort Halifax* and *Wells*, was triggered by a single event, that event would occur more than once, at a different time for each employee. There was no way to carry out that obligation with the unthinking, one-time, nondiscretionary application of the plan administrators in *Fort Halifax* and *Wells*. Although its application was uncertain, its term was short, and the number of its participants was small, the program's administration required a case-by-case, discretionary application of its terms. Whether or not Allied-Signal ever thought it would have to administer an ERISA plan does not matter; there was no way to administer the program without an administrative scheme. We hold that Allied-Signal was obligated to apply enough ongoing, particularized, administrative, discretionary analysis to make the program in this case a "plan".

Bogue contends that, even if the program is a "plan", it should not apply to him because he is not an employee

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[13] *Id.* at 635.

[14] 953 F.2d 960 (5th Cir. 1992).

[15] *Id.* at 962-63 (quoting *Pane v. RCA Corp.*, 667 F. Supp. 168, 170-71 (D.N.J. 1987)).

of the plan's administrator, Allied-Signal.[16] The appellees contend that, because Ampex assumed liability for a program established and administered by Ampex, the program *is* maintained by Bogue's employer.

Bogue cites cases holding that controlling shareholders cannot be personally liable for damages under a plan maintained by the corporation they control; he contends that a shareholder, like Allied-Signal, can never be an "employer" under ERISA.[17] The appellees note that ERISA defines the term "employer" broadly.[18] They argue that a benefit program established by a parent corporation for the employees of its wholly owned subsidiary should not be removed from ERISA's coverage simply because their corporate structure might seem to divide the two companies. We agree. When a corporation establishes an employee benefit plan for the employees of its wholly owned subsidiary and retains the duty to administer that plan, and when the subsidiary bears the financial burden of funding it, the plan is "established or maintained by an employer" and is accordingly controlled by ERISA.

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[16] 29 U.S.C. § 1002(1) defines an employee benefit plan as one "established or maintained by an employer".

[17] Without discussing the issue, two Second Circuit cases have applied ERISA to benefits established by parent corporations for employees of subsidiaries. *See Reichelt v. Emhart Corp.*, 921 F.2d 425, 427-28 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2854 (1991); *Accardi v. Control Data Corp.*, 836 F.2d 126, 127-28 (2d Cir. 1987).

[18] Allied-Signal also argues that it was Bogue's employer under ERISA when it established the program because it was acting in the interest of his employer, Ampex. 29 U.S.C. § 1002(5) provides that "[t]he term 'employer' means any person acting directly as an employer, *or indirectly in the interest fo an employer*, in relation to an employee benefit plan . . ." (emphasis added). Allied-Signal established the program in order to make Ampex more attractive to a potential buyer. Although this goal involved a level of self-interest to Allied-Signal, it cannot be said that it was *not* done in the interest of Ampex.

B. Standard of Review

After deciding that the program's administrative discretion entails ERISA preemption, a related question follows: Does a federal court review Allied-Signal's decision that Bogue was not entitled to severance pay *de novo* or only for an abuse of discretion? [19]

Bogue argues that the district court incorrectly applied an abuse of discretion standard in this case. The standard by which we review benefit decisions depends on the amount of discretion that the plan vests in its administrator. The Supreme Court has held that

> a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.[20]

The Allied-Signal program provides for severance payments if the buyer of Ampex does not provide the employee with "substantially equivalent employment":

> The determination of "Substantially equivalent" position will be made by Allied-Signal upon consideration of whether the new position:
>
> (i) has compensation and benefits with a value not less than 90% of your current compensation and benefits . . . ;
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> (ii) is located not more than 50 miles from your current work location; and

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[19] We review the district court's summary judgment *de novo*, of course. *Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990). The question here is what standard of review should be applied by any federal court in reviewing the plan administrator's decisions.

[20] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

(iii) has responsibilities similar to those of your current position.[21]

The full extent of the program's discretion, therefore, lies in the phrase "[t]he *determination . . . will be made by Allied-Signal* upon consideration of whether the new position . . . has responsibilities *similar to those of your current position*".[22]

The language of the plan in this case is virtually indistinguishable from language recently interpreted by this Court. In *Eley v. Boeing Co.*,[23] we considered a health plan whose administrator "shall determine the eligibility of a person for benefits under the plan" and stated that the administrator "retains final authority and responsibility for the Plan and its operation."[24] As in *Eley*, the program stated that Aliled-Signal would make the determination of eligibility for benefits, and the program clearly placed on Allied-Signal the ultimate responsibility for funding those benefits.[25] We find that the program imposes on Allied-Signal, "the administrator [,] . . . discretionary authority to determine eligibility for benefits or to construe the terms of the plan".[26]

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[21] Allied-Signal/E&I Sector Special Compensation Program for Designated Key Executives: *Severance Pay* 1-2.

[22] *Id.* (emphasis added). Obviously, the determinations of salary level and geographical location confer no discretion on the administrator. Only the meaning and effect of "substantially equivalent" and "responsibilities similar" are at issue.

[23] 945 F.2d 276 (9th Cir. 1991).

[24] *Id.* at 278 n.2.

[25] It provided that "Allied-Signal will make up the difference between the buyer's severance pay program and" 18 months' pay. Bogue concedes that, in spite of Ampex's assumption of liability for the program, Allied-Signal remained ultimately liable in case Ampex defaulted. There is no question that the program placed on Allied-Signal (as it placed on the administrator in *Eley*) the "final authority and responsibility" for its operation.

[26] *Bruch*, 489 U.S. at 115; *see Eley*, 945 F.2d at 278.

Language that establishes only an entity's right to administer or manage a plan does not confer discretion.[27] Nevertheless, we agree with the district court that the language in the Allied-Signal program

> does more than simply designate that Allied-Signal will be the administrator of the plan. It grants Allied-Signal the authority to evaluate and determine facts, including whether an employee's prior and prospective position are "similar". This evaluation necessarily invokes a judgmental function in analyzing the positions. Under *Firestone*, this is sufficient evidence of a grant of discretionary authority.[28]

We do not want to encourage an employer to insulate himself from effective appellate review through the abuse of vague phrases that fail to make clear to the employees that the employer will have the final determination of benefit decisions. Employees who lose promised benefits should not lose the additional benefit of judicial review because their employer reserved discretionary power to itself without making that reservation clear. But when a plan includes even one element is unambiguously retained by its administrator, we may not second-guess the exercise of that discretion. The program's beneficiaries were on notice that Allied-Signal had such discretion over determining whether their responsibilities were substantially reduced; we can reverse the exercise of such discretion only when it has been abused.

C. Conflict of Interest

Before arguing that Allied-Signal *did* abuse its discretion, Bogue asks us to impose a more stringent *version* of the abuse of discretion standard because a conflict of

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[27] *Bruch*, 489 U.S. at 111; *Orozco v. United Air Lines, Inc.*, 887 F.2d 949, 952 (9th Cir. 1989; *International Bhd. of Elec. Workers Local 47 v. Southern Cal. Edison Co.*, 880 F.2d 104, 108 (9th Cir. 1989).

[28] *Bogue v. Ampes Corp.*, 750 F. Supp. 424, 428 (N.D. Cal. 1990).

interest existed between the administrator and the beneficiary. This Court has confirmed that less deference applies when the administrator's decision involves a "serious conflict" between the administrator and the employee.[29] *Bruch* itself directs the courts to take into consideration any conflict of interest in looking for an abuse of discretion.[30]

Bogue contends that such a conflict existed between him and both Ampex (which would have had to fund his severance pay) and Allied-Signal. The district court in this case found no such conflict because Ampex did not make the benefit decision, and because Allied-Signal's decision had no effect on its own finances.[31]

We disagree with the district court, but we affirm its result even under the less deferential standard of review. We find that there were, in fact, two conflicts of interest in this case. First, there was the risk that Ampex might not reimburse Allied-Signal for any severance pay that the latter awarded to Bogue from an unfunded plan. As we noted above, Allied-Signal's indemnification agreement with Ampex did not relieve it of its primary responsibility to Bogue and his fellow employees. Second, and more important, there was Allied-Signal's dependence on Ampex for information about the similarity between Bogue's old and new responsibilities. It was obviously in the financial interest of Ampex to recommend against an award of severance pay that it would have to fund.

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[29] *Oster v. Barco of Cal. Employees' Retirement Plan*, 869 F.2d 1215, 1217 (9th Cir. 1988). Because the great deference accorded a plan administrator arises in part from the assumption of trust law that the trustee has no pecuniary interest in his decisions, proof that the trustee *does* have such interest correspondingly strengthens the court's level of review.

[30] 489 U.S. at 115.

[31] *Bogue*, 750 F. Supp. at 429-30.

We disagree with Bogue's argument that these conflicts of interest poisoned Allied-Signal's decision about the similarity of his old and new jobs. Bogue quotes a letter from Ampex advising Allied-Signal to deny Bogue's claim for severance pay. He finds in that letter conclusive evidence that a conflict of interest in both Ampex and Allied-Signal caused the denial of his claim. Allied-Signal did, apparently, rely on Ampex's characterization of Bogue's new job. Ampex, in turn, had a strong incentive (its wallet) not to recommend severance pay for Bogue. Nevertheless, in reviewing the record we find that Allied-Signal's decision to deny severance pay to Bogue not only satisfies the less deferential abuse of discretion standard of review; its decision was fully consistent with the plain language of the program.

D. Did Allied-Signal Abuse its Discretion?

The difference between Bogue's pre-acquisition and post-reorganization jobs at Ampex are in some practical respects great, but they involve very comparable levels of responsibility within the corporation. Allied-Signal did not abuse its discretion in finding the two jobs substantially equivalent. The district court's findings of fact say it all:

> Plaintiff's original position was Vice President and General Manager of the Audio-Video Systems Division. After the reorganization, Ampex offered plaintiff the position of Vice President, Marketing, Sales and Service. The undisputed evidence shows that under both positions plaintiff was (1) a vice president, reporting directly to the chief executive officer; (2) a member of the Executive Management Committee; (3) responsible for directing a discrete section of the company, including responsibility for its personnel (*e.g.* selection, compensation, benefits, training and terminations), finances, facilities, informa-

> tion systems, and implementation of corporate policies;[sic] and (4) responsible for directing sales, sales analysis, accounts receivable, servicing, and marketing services. Plaintiff's new position also continued his career path as a potential candidate for chief executive officer of Ampex. And compared to his position before the sale, plaintiff's annual salary increased from $125,000 to $150,000, and his bonus potential from $70,000 to $150,000.[32]

The district court concluded that Allied-Signal did not abuse its administrative discretion in denying Bogue severance payments. Although we apply a somewhat stricter standard of review to account for conflicts of interest between Ampex and Allied-Signal, we reach the same conclusion.

Because the district court's conclusion is irrefutable, Bogue appends a due process argument under ERISA; he contends that Allied-Signal failed to comply with ERISA's reporting and disclosure requirement. The defendants concede that Allied-Signal may have made procedural violations, but they contend that Bogue has not met his requirement of showing that any procedural defects caused him substantive harm or involved a substantive violation of ERISA.[33] They are correct.

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[32] *Id.* at 429.

[33] In *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1308 (9th Cir. 1986) (citations omitted), *disapproved on other grounds, Bruch*, 489 U.S. 101, this Court wrote:

> Substantive remedies are available for procedural defects under ERISA only when the defects "caused a substantive violation or themselves worked a substantive harm."

In *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985), a case relied on by Bogue, this Court noted that

> [o]rdinarily, a claimant who suffers because of a fiduciary's failure to comply with ERISA's procedural requirements is entitled to no substantive remedy.

E. Anti-Discrimination Under ERISA

Bogue seeks alternative relief under ERISA's antidiscrimination provision;[34] he alleges that Ampex violated that law by urging Allied-Signal to deny his claim for severance pay. He would find proof of discrimination against him in Ampex's admission that it provided severance pay to several executives who resigned after the program had ended. The district court held that 29 U.S.C. § 1140 does not apply unless the employee is actively or constructively discharged. Bogue notes that the language of § 1140 is not so limited. This Court has considered his argument, however, and refuted it.[35] Bogue offers no evidence that he was discharged.

The district court correctly found that Bogue had voluntarily resigned. His allegations of payments made to other executives are irrelevant because § 1140 prevents discrimination only "under the provisions of an employee benefit plan". It therefore does not apply to payments made voluntarily by Ampex after the program had terminated. The court also found, correctly, that Ampex's letter of recommendation to Allied-Signal was nothing more than a "matter-of-fact description of the relationship between Ampex and plaintiff after Ampex's reorganization". Bogue's only legal support for his discrimination charge

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[34] 29 U.S.C. 1140 provides:

> It shall be unlawful for any person to . . . discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . .

[35] *See Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989) ("[T]o establish a violation under § 1140, a plaintiff-employee must show that his [exercise of rights under the benefit plan] was the motivating force behind his discharge."), *cert. denied*, 111 S.Ct. 53 (1990); *Lojek v. Thomas*, 716 F.2d 675, 680-81 (9th Cir. 1983); *see also Kuntz v. Reese*, 760 F.2d 926, 933 (9th Cir. 1985) ("[§ 1140] does not apply in cases, such as the one before us, in which the employees are not discharged."), *withdrawn on other grounds*, 785 F.2d 1410 (9th Cir.), *cert. denied*, 479 U.S. 916 (1986).

is the letter Ampex sent Allied-Signal. That charge was properly dismissed.

F. Attorney Fees

ERISA allows us to award attorney fees to either party for costs incurred in bringing an appeal.[36] Although Bogue does not prevail here, we find that his appeal was not brought in bad faith; that the defendants are as able as he to bear the cost of their attorney fees; that an award of fees against him would not discourage others from raising appeals more frivolous than his; and that the parties' positions were relatively equal in merit.[37] For those reasons we refuse to charge him with the defendants' attorney fees for this appeal.

III. CONCLUSION

For the reasons stated above, we AFFIRM the district court's order granting summary judgment in favor of the defendants. The defendants' request that we impose on Bogue their attorney fees for this appeal is DENIED.

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[36] *See* 29 U.S.C. § 1132(g)(1).

[37] This Court has outlined five factors to be measured in deciding whether to award attorney fees to a prevailing party in an ERISA case. Those factors are:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Hummell v. S. E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980). We have relied on factors one, two, three, and five in reaching our conclusion. Factor four seems inapplicable here. Although it weighs against Bogue in that he seeks a benefit only for himself, the factor seems to apply only when a prevailing *plaintiff* seeks attorney fees; ERISA's provision for such an award recognizes that a case brought by such a plaintiff often benefits a large group of others in similar situations.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-89-0682 CAL

DONALD F. BOGUE,

Plaintiff,

v.

AMPEX CORPORATION, and ALLIED-SIGNAL, INC.,

Defendants.

OPINION AND ORDER GRANTING SUMMARY JUDGMENT

[Filed October 26, 1990]

Plaintiff Donald Bogue brings this action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, claiming that defendants wrongfully denied him severance benefits, breached their fiduciary duties, and interfered with his protected rights. Defendants have moved for summary judgment on all claims alleged against them in the first amended complaint. Having considered the record, the relevant authorities, the moving and opposing papers, and the arguments of counsel, the court concludes that there is no genuine issue of material fact and that summary judgment should be granted in favor of defendants.

I.

The following facts are undisputed: Plaintiff seeks severance benefits under the terms of the "Allied-Signal/E&I Sector Special Compensation Program for Designated Key

Executives." This program was established by Allied-Signal in November 1986 in conjunction with its proposed sale of Ampex Corporation, a wholly owned subsidiary. Plaintiff was an employee of Ampex. The program included severance benefits if:

> Neither Allied-Signal nor the Buyer [of Ampex] offers you "substantially equivalent" employment and your employment is terminated.

Allied-Signal sold Ampex to Newhill Acquisition Corporation in May 1987. Pursuant to that sale agreement, Ampex assumed the financial obligations for the severance portion of the program, and Allied-Signal remained the plan's administrator.

Ampex was reorganized in November 1987. Prior to the reorganization, plaintiff held the position of Vice President and General Manager of the Audio-Video Systems Division of Ampex. After the reorganization, Ampex offered plaintiff the position of Vice President of Marketing, Sales & Service. Plaintiff accepted the new position. However, he expressed reservations about whether the new position was substantially equivalent to his prior position. Plaintiff resigned his new position in January 1988, because he then believed that the position "consists of significantly diminished responsibility." He made a claim to Allied-Signal for the severance benefits under the program. In March 1988, Allied-Signal denied his claim, finding that plaintiff's new position was substantially equivalent to his former position. Plaintiff's claim was reconsidered by Allied-Signal, and was again denied.

II.

Plaintiff then filed this action in state court. Defendants removed the case to this court on the ground that plaintiff's severance claims are governed by ERISA, and are therefore within the original jurisdiction of this federal district court. On plaintiff's motion to remand, this court ruled that the severance plan was governed by

ERISA and that removal was proper. The court also dismissed the complaint, with leave to amend to replead the claims under the standards of ERISA. Plaintiff then filed the present amended complaint, and this summary judgment motion followed.

The amended complaint contains four claims: the first is for $512,300, plus interest, in severance benefits and for attorneys fees; the second alleges that Ampex is estopped from denying severance benefits to plaintiff; the third alleges that Ampex interfered with plaintiff's protected benefit rights in violation of 29 U.S.C. § 1140; the fourth alleges breach of fiduciary duties in violation of 29 U.S.C. § 1109.

III.

Plaintiff's first claim, for the recovery of benefits under the plan, is based on 29 U.S.C. § 1132(a)(1)(B) (1985).[1] This section creates a cause of action for the recovery of benefits "due to him under the terms of his plan." The resolution of plaintiff's claim therefore turns on an interpretation of the plan provisions which define the severance benefits.

A.

The first and critical question is the standard for this court's review of Allied-Signal's decision to deny the severance benefits to plaintiff. Plaintiff contends that he is entitled to *de novo* review of Allied-Signal's decision. Defendants maintain that Allied-Signal's decision can be reviewed only for an abuse of discretion. Both parties agree that the U.S. Supreme Court's decision in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989) is controlling.[2]

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[1] All subsequent statutory references are to Title 29.

[2] The Ninth Circuit upheld retroactive application of *Firestone* in *Orozco v. United Air Lines, Inc.*, 887 F.2d 949 (9th Cir. 1989).

ERISA does not itself specify the standard for a district court's review in actions under § 1132(a)(1)(B) challenging the determinations of benefit eligibility by a plan administrator. *Firestone*, 489 U.S. at 109. To fill this gap, the Supreme Court adopted a standard of review from the principles of trust law. *Id.* at 954. Those trust principles require a deferential standard of review when a trustee exercises powers that are discretionary. *Id.* Accordingly, the *Firestone* court said:

> [A] denial of benefits under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Id. at 115.

Therefore, the question becomes whether this plan vests in Allied-Signal the discretion either to settle disputed eligibility questions or to construe doubtful provisions of the plan. *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1186 (4th Cir. 1989); *Kunin v. Benefit Trust Life Ins. Co.*, 898 F.2d 1421, 1424 (9th Cir. 1990), *amd.*, *reh'g denied*, 910 F.2d 534 (9th Cir. 1990). This court is required to construe the plan in light of its language, "all the circumstances," and other manifestations of the parties' intent. *Firestone*, 489 U.S. at 112-113. If Allied-Signal is entitled to exercise discretion under the plan, its decision to deny plaintiff's benefits may be distributed only upon a showing of a procedural or a substantive abuse of that discretion. *Johnson v. Trustees of W. Conf. of Teamsters Pension Trust Fund*, 879 F.2d 651, 654 (9th Cir. 1989); *Firestone*, 489 U.S. at 111.

B.

Defendants contend that the plan gives Allied-Signal discretionary authority both to determine eligibility for benefits and to construe the plan's terms. Plaintiff responds that the plan only designates the entity that is to

determine employee claims and that, under *Firestone*, this is insufficient to confer discretion on the administrator.

The language of the plan provides for the payment of severance benefits if the buyer of Ampex does not offer plaintiff:

> [A] position that is substantially equivalent to your current position. This determination will be made by Allied-Signal upon consideration of whether the new position:
>
> (i) has compensation and benefits with a value not less than 90% of your current compensation and benefits . . .;
>
> (ii) is located not more than 50 miles from your current work location; and
>
> (iii) has responsibilities similar to those of your current position.

Conditions (i) and (ii) are undisputed by plaintiff. At the time of the sale of Ampex, plaintiff's salary was $125,000, with a bonus potential of $70,000. After the reorganization, plaintiff's new position had a salary of $150,000, with a bonus potential of $150,000. Both jobs were located at Ampex's Redwood City headquarters. The dispute is whether discretion is conferred upon Allied-Signal to determine if the positions have similar responsibilities; condition (iii).

Plaintiff is correct that language which only establishes an entity's right to administer or manage a plan does not confer discretion. *Firestone*, 489 U.S. at 111. *Orozco v. United Air Lines, Inc.*, 887 F.2d 949, 952 (9th Cir. 1989); *International Brotherhood of Electrical Workers Local 47 v. Southern California Edison*, 880 F.2d 104, 108 (9th Cir. 1989). However, language in a plan which grants authority to the administrator to determine questions of eligibility and coverage is sufficient to demonstrate discretionary authority. *See e.g., Lakey v. Reming-*

ton Arms Co., 874 F.2d 541, 544 (8th Cir. 1989) (severance pay plan permitted administrator 'to interpret the more usual situations that may arise in the application of the principles of the [severance pay] policy'); *Richards v. United Mine Workers' Health & Retirement Fund*, 895 F.2d 133, 135 (4th Cir. 1990) (independent trustees have the power of 'full and final determination as to all issues concerning eligibility for benefits.'). The Eleventh Circuit, in *Newell v. Prudential Ins. Co.*, 904 F.2d 644 (11th Cir. 1990), upheld the application of the abuse of discretion standard to a group medical, health and accident policy:

> The district court correctly concluded that because the Prudential plan . . . gives Prudential some degree of discretion in determining whether charges would be deemed necessary and eligible, *Firestone* would sanction the continued application of the arbitrary and capricious standard to the instant case.

Newell, 904 F.2d at 650.

The terms of this plan provide that a determination of whether plaintiff has been offered "a position that is substantially equivalent to [plaintiff's] current position . . . will be made by Allied-Signal upon consideration of whether the new position . . ." That language does more than simply designate that Allied-Signal will be the administrator of the plan. It grants Allied-Signal the authority to evaluate and determine facts, including whether an employee's prior and prospective positions are "similar." This evaluation necessarily invokes a judgmental function in analyzing the positions. Under *Firestone*, this is sufficient evidence of a grant of discretionary authority. *Firestone*, 489 U.S. at 115. Allied-Signal's decision to deny plaintiff the severance benefits may therefore be reversed only for an abuse of discretion. *See also, Madden v. ITT Long Term Disability Plan*, —— F.2d —— (9th Cir. 1990).

Plaintiff urges that this conclusion should be modified because of what he construes to be a conflict of interests

by Allied-Signal. However, *Firestone* teaches that a conflict of interests is only a "factor" in evaluating whether there was an abuse of discretion; it does not change the standard of review:

> [I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor[] in determining whether there is an abuse of discretion.'

Firestone, 489 U.S. at 115 (quoting, Restatement (Second) of Trusts § 187, comment d (1959). This court discusses the claimed conflict factor below.

C.

Under the "abuse of discretion" standard of review, defendants move for summary judgment on the ground that Allied-Signal's denial of severance benefits was based on a reasonable interpretation of the terms of the plan, and was supported by the fact record. Plaintiff objects that Allied-Signal acted arbitrarily and capriciously, and violated due process in denying his claim.[3]

Plan administrators act arbitrarily and in abuse of their discretion if they render a decision without any explanation, or construe or apply a plan in a way "that clearly conflicts with the plain language of the plan." *Johnson v. Trustees of W. Conf. of Teamsters Pension Trust Fund*, 879 F.2d 651, 654 (9th Cir. 1989) (citing *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1307 (9th Cir. 1986). Allied-Signal did explain its decision to plaintiff. The question

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[3] Plaintiff also asserts that he has produced substantial evidence to show that the new position was not substantially similar to his prior position, and that a triable issue is therefore raised about the reasonableness of Allied-Signal's exercise of discretion. However, showing substantial evidence is not enough when the standard of review is abuse of discretion.

is whether Allied-Signal arbitrarily construed and applied the terms of the plan. The record demonstrates that there are sufficient facts in the record for Allied-Signal to make the decision that it did, and this court cannot conclude that it acted arbitrarily or abused its discretion:

Plaintiff's original position was Vice President and General Manager of the Audio-Video Systems Division. After the reorganization, Ampex offered plaintiff the position of Vice President, Marketing, Sales and Service. The undisputed evidence shows that under both positions plaintiff was (1) a vice president, reporting directly to the chief executive officer; (2) a member of the Executive Management Committee; (3) responsible for directing a discrete section of the company, including responsibility for its personnel (*e.g.*, section, compensation, benefits, training and terminations), finances, facilities, information systems, and implementation of corporate policies, and (4) responsible for directing sales, sales analysis, accounts receivable, servicing, and marketing services. Plaintiff's new position also continued his career path as a potential candidate for chief executive officer of Ampex. And compared to his position before the sale, plaintiff's annual salary increased from $125,000 to $150,000, and his bonus potential from $70,000 to $150,000.

Plaintiff argues that there were numerous differences between his former and new positions, and as a result of those differences, plaintiff came to view his new position as a demotion.[4] However, the fact that there were some differences between the two positions is insufficient for plaintiff to establish that Allied-Signal's finding of similarity was arbitrary or an abuse of its discretion.

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[4] Plaintiff also emphasizes the declaration of his expert witness, a managing director of an executive search firm, which concluded that the two positions did not have "responsibilities similar," as that term would be understood in the marketplace for corporate executive positions.

The language of the plan says a "similar" position, not an "identical" one. Even though plaintiff can point to differences, and his expert witnesses would agree, the above facts are a sufficient record for the administrator to make the decision that it did, under the discretion vested in it.

D.

Did Allied-Signal have a conflict of interest which should be weighed in determining whether there was an abuse of discretion? Plaintiff contends that there was a conflict because Ampex was allegedly obligated to "indemnify" Allied-Signal for severance benefit payments.

Less deference is to be given to an administrator's decision, if the decision involved a "serious conflict" between the administrator and the employer. *Oster v. Barco of California Employees' Retirement Plan*, 869 F.2d 1215, 1217 (9th Cir. 1988). However, there is no evidence that Allied-Signal was financially liable for any severance benefits after the sale of Ampex. To the contrary, as plaintiff alleges in his complaint, when Allied-Signal sold Ampex to Newhill Acquisition Corporation, "Ampex assumed the obligation for the payment to plaintiff of his benefits under the Plan." [5] Allied-Signal's decision to award or deny benefits would have no impact on Allied-Signal's finances. This court's review therefore remains deferential. *Fielding v. International Harvester Co.*, 815 F.2d 1254, 1256 (9th Cir. 1987).

Allied-Signal's interpretation of the plan and denial of benefits to plaintiff was not an abuse of discretion. Defendant's motion for summary judgment on the first cause of action is therefore granted.

IV.

Plaintiff's second claim is against Ampex alone, alleging that Ampex is estopped to deny severance benefits to plaintiff. Ampex contends that it is entitled to summary

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[5] *See* Complaint at ¶ 12.

judgment on this claim for three reasons. First, estoppel cannot apply against Ampex because Ampex did not administer the plan and did not make the decision adverse to plaintiff. Second, an employee benefit plan cannot be required by estoppel to make payments that are inconsistent with the written plan. Third, there is no basis for estoppel because plaintiff admits that he resigned without seeking or receiving any assurance of his eligibility for benefits.

Defendant is correct that a plan may not be required by estoppel to make payments which are not authorized by the written plan. *Hansen v. Western Greyhound Retirement Plan*, 859 F.2d 779, 781 (9th Cir. 1988). However, an employer could be estopped, because recovery against the employer who is not the administrator would not diminish the fund. *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1155 (9th Cir. 1986). *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1096 (9th Cir. 1985). Plaintiff's estoppel claim names his employer Ampex, not the plan or its administrator, and is therefore properly pleaded.

However, to survive summary judgment, plaintiff must demonstrate a triable issue of fact on the following elements:

> (1) the party to be estopped [Ampex] must know the facts; (2) [Ampex] must intend that [its] conduct shall be acted on or must so act that [plaintiff] has a right to believe it is so intended; (3) the [plaintiff] must be ignorant of the true facts; and (4) [plaintiff] must rely on [Ampex's] conduct to his injury.

Ellenburg, 763 F.2d at 1096.

It is undisputed that Ampex "knew the facts" of plaintiff's interpretation of the severance plan and his new position. The issues are what plaintiff knew and

Ampex's intent. Plaintiff alleges that in conversations with Ampex Chief Executive Officer Max Mitchell, Mitchell agreed that plaintiff's new and old positions did not have "similar responsibilities." Plaintiff confirmed his understanding of these conversations with Mitchell in two letters which were sent to both Ampex and Allied-Signal.[6]

Plaintiff also alleges that on January 22, 1988, Mitchell accepted his resignation without disagreeing with his position that he was entitled to severance benefits. However, the January 22 letter contained no discussion of severance benefits. And plaintiff cannot claim that he resigned based upon any assurance by Ampex that he would get the severance benefits. He testified at his deposition that he did not expect a reply to his letters, but sent them to "reserve his rights." The letters from plaintiff are evidence of his intent, not Ampex's. Plaintiff cannot claim that because Ampex failed to respond it adopted his interpretation, with the intent of inducing him to rely on his own assertions. Moreover, the letters show that plaintiff was not ignorant of the true facts and was aware of the similarity issue. Plaintiff therefore cannot demonstrate the second and third elements required for

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[6] Plaintiff's October 29, 1987 letter stated:

> [A]s we have agreed in several conversations over the past few weeks . . . the new position is not "substantially equivalent" to my current position in that it does not entail "similar responsiiblities."

Plaintiff's January 7, 1988 letter of resignation:

> Prior to my taking the Marketing, Sales and Service position, we thoroughly discussed and agreed that the role was vastly different in content and responsibility from that which I then held in [Ampex].
>
> After nearly four months of discussing the sales division concept with [Mitchell] . . . *I* have concluded that the role does not fulfill *my* expectations in terms of responsibility, management influence or opportunity to carry out real change is Ampex. (emphasis added).

estoppel. Summary judgment is therefore granted to Ampex on the second cause of action.

V.

Plaintiff's third claim alleges a violation of 29 U.S.C. § 1140 (1985). That statute provides:

> It shall be unlawful for any person to . . . discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . .

Plaintiff claims that after he resigned, Ampex discriminated against him by intentionally and in bad faith informing Allied-Signal that it had offered plaintiff substantially equivalent employment.

The legislative history of section 1140 reveals that it was directed at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights. *Lojek v. Thomas*, 716 F.2d 675, 680-61 (9th Cir. 1983). No claim is stated under this statute unless the employee is affirmatively or constructively discharged. *Id.*; *accord Young v. Standard Oil (Indiana)*, 660 F. Supp. 587, 597 (S.D. Ind. 1987), *aff'd*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988).

Plaintiff asserts that although section 1140 is "primarily" designed to prevent employers from discharging or harassing employees who seek benefits that, this is not its only purpose. However, the cases cited by plaintiff do not support this argument. *Conciatore v. Leahy's Fuel, Inc.*, 686 F. Supp. 383 (D.C. Conn. 1988) has been withdrawn from publication. In *Furcini v. Equibank, NA*, 660 F. Supp. 1436 (W.D. Pa. 1987), the court stated that a section 1140 claim for interference with severance pay "necessarily presupposes . . . discharge." *Id.* at 1439. The *Furcini* court said that a discrimination action would be appropriate if it is based on the way the employer

characterized the discharge *Id.*; but no such claim is made here.

Plaintiff's section 1140 claim therefore fails because it is undisputed that he was not affirmatively or constructively discharged. He resigned.[7]

Plaintiff attempts to avoid that result by alleging discrimination and bad faith in the administration of the plan. Even if this allegation is actionable under section 1140, it is not supported by sufficient evidence to create a genuine issue of material fact. Plaintiff relies on two pieces of evidence. First, plaintiff construes a February 23, 1988 letter from Ampex's Secretary and General Counsel to Allied-Signal [8] as evidence of Ampex's intent to "intentionally and maliciously subject[] plaintiff to oppressive, cruel, and unjust hardship in conscious disregard of plaintiff's rights." This claim is answered by the letter itself. It is a matter-of-fact description of the relationship between Ampex and plaintiff after Ampex's reorganization. It contains no evidence of affirmative or constructive discharge, or any expression of "malice." Second, other Ampex executives were paid severance benefits even though they voluntarily resigned *after* the expiration date of the plan. However, a claim of a violation of section 1140 requires discrimination for exercising a right "under the provisions of an employee benefit plan." Ampex's conduct after expiration of the plan has no bearing on plaintiff's claim for discrimination in implementation of the plan. Defendants are therefore granted summary judgment on the third cause of action.

VI.

Plaintiff's fourth claim is under 29 U.S.C. § 1109 (1985), alleging that defendants breached their fiduciary

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[7] *See* Letter from plaintiff to Mitchell, dated January 7, 1988: "I regret to inform you of my intention to resign from Ampex."

[8] Decl. of Leflar, Ex. B.

duties by failing to pay benefits to which he was entitled under the plan.

There are two defects in this claim. First, as discussed above, plaintiff is not entitled to severance benefits because Allied-Signal did not abuse its discretion in denying him benefits. Second, section 1109 does not give a right of action to individual beneficiaries of a plan, only to the plan itself. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985). It does not convert every dispute over a claim for benefits into a breach of fiduciary duty if the claim is denied. Section 1109 was designed to protect the assets of the plan from the improper acts of those controlling those assets.

Plaintiff argues that *Russell* permits a participant to recover benefits from a fiduciary. Indeed; but that result was based on other statutes, not on section 1109, and the complaint does not allege violations of those other statutes.

Finally, plaintiff claims that he is entitled to relief under section 1109 on the grounds that it provides for "other equitable or remedial relief as the court may deem appropriate." However, as stated, the remedies run to the plan and not to the beneficiary. *Russell*, 473 U.S. at 144.

VII.

Plaintiff's brief in opposition to the summary judgment motion adds several arguments that plaintiff was denied due process. No claim for denial of due process is stated in the First Amended Complaint. However, even assuming that plaintiff's arguments are properly raised, the record demonstrates that plaintiff received the process that he was due.

ERISA requires written notice of the reasons why an application for benefits is denied, and a reasonable opportunity for a full and fair review of the denial by an appropriate fiduciary. 29 U.S.C. § 1133 (1985); *White*

v. Jacobs Engineering Group Long Term Dis. Ben. Plan, 896 F.2d 344, 349 (9th Cir. 1989).

Specifically, every employee benefit plan shall:

> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1133; *see also* 29 C.F.R. § 2560.503-1(f) (1990).

It is undisputed that plaintiff received a copy of the plan in November 1986. After Ampex's reorganization, plaintiff informed Ampex of his position on severance benefits in a series of discussions during August through October 1987. Plaintiff's letter of acceptance stated in detail his view that the new position was not "substantially equivalent." His letter of resignation and letter to Allied-Signal reiterated his position. A follow-up letter was sent by plaintiff to Russell Hawkins at Allied-Signal on February 3, 1988. On February 23, 1988, Ampex wrote Allied-Signal, explaining its position on plaintiff's claim for benefits. Hawkins read Ampex's letter to plaintiff over the phone, and later sent plaintiff a copy. Hawkins informed plaintiff by phone on March 2, 1988 that his claim for severance benefits was denied, and that this decision was based on the February 23 letter from Ampex and plaintiff's letters of October 29, 1987, January 7, 1988, and February 3, 1988.

Allied-Signal's procedures were somewhat informal. However, the record shows that plaintiff received written notice in a manner calculated to be understood by him,

setting forth the specific reasons for the denial of his claim, and with reference to the pertinent plan provisions, as required by section 1133(a) and 29 C.F.R. § 2560.503-1(f). Plaintiff's own letters show that he understood the issues and the terms of the plan.

Plaintiff claims that he was denied a right of reconsideration. However, a March 8, 1988, letter from the plan administrator, addressed plaintiff's "appeal." The letter sets out in detail the reasons for the denial of plaintiff's claim. A further statement of plaintiff's position and a request for review was made by plaintiff's attorney on March 15, 1988. The administrator reviewed the letter and declined further reconsideration.

Plaintiff has received the "due process" required by section 1133 and 29 C.F.R. § 2560.503-1(f), and defendants are entitled to summary on that argument.

IT IS SO ORDERED.

DATED: October 26, 1990.

/s/ Charles A. Legge
CHARLES A. LEGGE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-89-0682-CAL-TSC

DONALD F. BOGUE,

Plaintiff,

vs.

AMPEX CORPORATION, ALLIED-SIGNAL INC., and DOES 1-10, inclusive,

Defendants.

ORDER

[Filed August 11, 1989]

The motion of defendants *AMPEX CORPORATION* and *ALLIED-SIGNAL INC.* for summary judgment dismissing all claims in the "Complaint for Breach of Contract, Wrongful Termination of Employment, and Interference with Contract" came on regularly for hearing on July 28, 1989 together with plaintiff's motion to remand to state court. Bruce H. Munro, Esq. appeared for plaintiff and John R. Leflar, Esq. appeared for defendants. The Court having considered the papers submitted and the arguments of counsel, and good cause appearing, the motion for summary judgment is GRANTED and the motion to remand is DENIED.

IT IS HEREBY ORDERED that all claims in the complaint are dismissed on the ground that they are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). There is no genuine issue as to any material fact and defendants are entitled to a

judgment as a matter of law. Plaintiff shall have 30 days to amend his complaint to state claims under ERISA instead of state common law claims.

Dated: Aug. 11, 1989

/s/ Charles A. Legge
CHARLES A. LEGGE
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-15038

D.C. No. CV-89-0682 CAL

DONALD F. BOGUE,
Plaintiff-Appellant,

v.

AMPEX CORPORATION and ALLIED-SIGNAL, INC.;
DOES 1-10, INCLUSIVE,
Defendants-Appellee.

ORDER

[Filed November 23, 1992]

Before: WISDOM *, BEEZER, and TROTT, Circuit Judges.

The panel has voted to deny the petition for rehearing filed by appellant on October 21, 1992.

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* The Honorable, John Minor Wisom, United States Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX E

ALLIED SIGNAL

Allied-Signal Inc.
P.O. Box 3000R
Morristown, NJ 07960-2496
Telephone: (201) 455-2389

Gerard L. Seelig
Executive Vice President

November 10, 1986

Donald F. Bogue
Participation in Allied-Signal, E&I Sector
Special Compensation Program for Designated
Key Executives

Dear Don:

As you know, Allied-Signal has indicated that it plans to sell various businesses in the E&I Sector, including Ampex. As one of our key executives, we appreciate your importance to the ongoing operations of the company and to its successful sale.

To alleviate some of your financial concerns and to encourage your continued support and cooperation, I am pleased to confirm your participation in the special compensation program—the terms of which are annexed.

In addition, I want to assure you that the annexed Salary Continuation Program (i.e. severance pay) will continue to cover you up to the sale of the business. I also want to assure you that if your employment is terminated by the buyer, (except for cause) during the 12 month period following the sale we will make up the difference between the buyer's severance pay program and the annexed Plan.

If you have any questions, please feel free to call Tom Rea at extension 6711.

/s/ Jerry Seelig
G. L. SEELIG

Allied-Signal/E&I Sector
Special Compensation Program for
Designated Key Executives:

Stay Bonus

Donald F. Bogue:

1. *Amount.* $100,000. half conditioned on remaining with Allied Signal through the Compensation Date and half conditioned on remaining with the buyer for 90 days, such payments to be made within 30 days after each event or a later date agreed upon by you and Allied-Signal.

2. *Eligibility.* Continued service through the Completion Date, which is the earlier of:

   (1) The closing date for the sale of the company; or

   (2) 12 months from 12-1-86, subject to a 90-day extension if Allied-Signal determines that it will be engaged in active discussions with a potential buyer during that extension period.

3. *Effect of Termination.*

   (1) Prior to the sale date if your employment is terminated by Allied-Signal, other than for cause, you will receive the full Stay Bonus. After the sale date, a rejection or an acceptance of continued Allied-Signal employment in any capacity will not negate your eligibility for the Stay Bonus.

   (2) If your employment is "terminated" by the buyer prior to completion of 90 days of ongoing service with the buyer, other than for cause, Allied-Signal will pay the second half as well as the first half of the Stay Bonus. You will be considered as "terminated" by the buyer if you are not offered continued employment in a position that is substantially equivalent to your cur-

rent position. This determination will be made by Allied-Signal upon consideration of whether the new position:

(i) has compensation and benefits with a value not less than 90% of your current compensation and benefits, not including stock options, restricted units/shares, performance units and your qualified Savings Plan;

(ii) is located not more than 50 miles from your current work location; and

(iii) has responsibilities similar to those of your current position.

Allied-Signal/E&I Sector
Special Compensation Program For
Designated Key Executives:

Sale Price Incentive

Donald F. Bogue:

In consideration of your service in connection with the contemplated sale of Ampex and on condition that you continue your employment through the closing date of such sale, you will be paid a Sale Price Incentive as follows:

Purchase Price	Incentive ($)
375 and Below	0
over 375M	$2,000 per million

Purchase Price is the price used to calculate the fee paid to the Investment Banker by Allied-Signal for the sale of this business.

This Sales Price incentive will be paid within 30 days after the closing date of the sale or a later date agreed upon by you and Allied-Signal.

* * * *

This program will terminate on March 31, 1988.

Allied-Signal/E&I Sector
Special Compensation Program for
Designated Key Executives:

Severance Pay

Donald F. Bogue:

We are extending the terms of the existing severance program as follows:

In the event (1) your employment is terminated by Allied-Signal, other than for cause, prior to the sale date, or (2) Neither Allied-Signal nor the Buyer offers you "substantially equivalent" employment and your employment is terminated, or (3) your employment is terminated by the buyer, other than for cause, within one year after such acquisition, Allied-Signal will make up the difference between the buyer's severance pay program and the following:

- 18 months severance pay

Pay Definition

Pay is defined to include base salary and annual incentive compensation. Annual incentive compensation shall mean the lesser of the last average percentage award for employees in similar positions or the individual's average percentage incentive award in the last three incentive periods (or such lesser period as the executive may have been employed) times the current base salary. Long-term performance incentive awards shall not be considered in determining annual incentive compensation.

Benefits

All benefits, except as otherwise provided by the terms of the controlling plan, will be continued during the period unless similar benefits are provided by a subsequent employer. For pension purposes, only the first twelve months of severance and the base pay thereof

will be used for vesting and pension calculations; the normal policy for qualifying leaves remains applicable thereafter. Fringe benefits, such as automobiles or memberships, will not be continued during the period.

- Professional outplacement assistance.

The determination of "Substantially equivalent" position will be made by Allied-Signal upon consideration of whether the new position:

(i) has compensation and benefits with a value not less than 90% of your current compensation and benefits, not including stock options, restricted units/shares, performance units and your qualified Savings Plan;

(ii) is located not more than 50 miles from your current work location; and

(iii) has responsibilities similar to those of your current position.

* * * *

This program will terminate on March 31, 1988.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

29 U.S.C. section 1002(1) provides as follows:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. section 186(c) provides as follows:

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase

of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by

the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply

to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.